side. The braking therefore was ineffective for bringing the steered course under immediate control, because throughout the 60 feet of braking the car was continuing to go further away from its own side of the road. The obvious reason must be that the driver was taking the bend at an excessive speed and the curve was sharper than he had anticipated." In other words the 3rd appellant took the bend in T. car much too quickly and swinging out over to his wrong side of the road collided with the M. car.

For myself after a careful study of the plans and photographs I have come to the conclusion that they in every way confirm the evidence of the respondent and I therefore respectfully agree with the findings of negligence by the learned trial judge.

With regard to the question of damages, it was agreed by Mr. Sault for the respondent that the award for special damages should be reduced from $19,572.17 to $15,480.75. This latter figure includes an allowance for loss of bonus from $10,000 to $6,000. The respondent had been employed as manager of Ulu Lengeng Estate, Tampin. After the accident he was employed at a much reduced salary in the office and as the reduction in bonus coincided with his reduction in status it seems a reasonable assumption that the one resulted from the other.

With regard to the award of $80,000 for general damages, my immediate reaction on first reading the record was "that's too high". I still think it is, though I am very conscious of the fact that it is a mere difference of opinion between the learned trial judge and myself.

But the respondent's employment was not in fact as secure as Khan J. seemed to have believed. In fact the Ulu Lengeng Estate has been sold since the accident. In all the circumstances I feel that a more realistic figure would be $50,000 a sum that will compensate the respondent for loss of salary for a number of years.

I would therefore vary the order of the lower Court by reducing the award for general damages to $50,000 and for special damages to $15,480.75.

I think the respondent should have all his costs in the lower Court and four-fifths of the costs of this appeal.

Barakbah J.A.: I have had the advantage of reading the judgment of my brother Hill J.A. with which I agree and have nothing to add.

Appeal dismissed. Damages reduced.

Solicitors:—*Murphy & Dunbar; Sault, Keith Sellar & Co.*

KHONG KIT SENG & ANOR. v. NIBLOCK

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) May 20, 1963]

[K.L. — F.M. Civil Appeal No. 4 of 1963]

Solicitor and client—Costs paid on lump sum basis—Client a limited company—Winding-up—Liquidator asking for delivery of detailed bill of costs and taxation.

Practice and Procedure—Company winding-up—Liquidator asking for detailed bill of costs from company's solicitor who was paid lump sum—Whether proceedings commenced by originating summons in liquidator's name a nullity or irregularity.

In this case the appellants, solicitors, did some work for an insurance company in 1961 and were paid for in a lump sum. Early in 1962 the company went into liquidation under a winding-up order. On examination of the transaction between the appellants and the company the liquidators in the name of one of themselves commenced proceedings against the appellants asking for a delivery of a detailed bill of costs and taxation of the same. The appellants sought to strike out the proceedings on grounds, *inter alia*, that the proceedings should have been commenced not in the name of the liquidator but in the name of the company.

Held: the commencement of the proceedings by the liquidator in his own name was neither a nullity nor an irregularity.

Cases referred to:—

(1) *In re James* 4 DeG. & Sm. 183.

(2) *In re Marseilles Extension Railway and Land Company* L.R. 11 Eq. 151.

(3) *In re Foss* [1912] 2 Ch. 161.

(4) *In re Palace Restaurants, Ltd.* [1914] 1 Ch. 492.

COURT OF APPEAL.

Lim Kean Chye (*N. H. Chan* with him) for the appellants.

Y. S. Chong for the respondent.

The liquidator of an insurance company in his own name and describing himself as such liquidator took out an originating summons under the Advocates and Solicitors Ordinance, 1947, against the partners of a firm of solicitors for an order, *inter alia*, that the solicitors' costs may be taxed. The solicitors applied in Chambers for the originating summons to be set aside on the grounds, *inter alia*, that the liquidator was not a competent or proper party to the proceedings and that the form was bad as the Originating Summons was not cast in the proper form.

The learned Judge held that the description of the plaintiff as "Anthony Niblock, Liquidator, Venhen Assurance Company Ltd. (In Liquidation)" was a minor irregularity and ordered under O.70 that the name of the company be substituted therefor. The Judge also held that the use of the form of the Originating Summons was a mere irregularity and cured the irregularity under O.70.

The solicitors appealed.

N. H. Chan: Actions are brought or defended in the company's name, unless an order is made under s. 185 Companies Ordinance vesting the estate in the liquidator: 6 Halsbury's Laws (3rd ed.) pp. 559, 616, 586; *Re Sartoris* [1892] 1 Ch. at p.14. This is not a case of misnomer or misdescription: *Whittam* v. *W. J. Daniel*

& Co. Ltd. [1961] 3 W.L.R. 1123 at 1127, *Davies* v. *Elsby Brothers Ltd.* [1961] 1 W.L.R. at 174, 176. *Alexander Mountain* v. *Rumier* [1948] 2 K.B. 436 is distinguishable as a case of misnomer in the plaintiff's name. At any rate, the defect is not curable under O.70, 1963 *Annual Practice* p. 1986. Only irregular proceedings are curable under O.70. But if proceedings a nullity, not curable; right *ex debito justitiae* to set aside; *Craig* v. *Kanssen* [1943] 1 K.B. 250; *MacFoy* v. *United Africa Co. Ltd.* [1961] 3 W.L.R. 1405 at 1409—1410. *Pontin* v. *Wood* [1962] 2 W.L.R. 258 at 259, 263. Non-compliance with Rules of the Supreme Court is an irregularity, but if something was done which ought not to be done which is independent of any of the Rules it is a nullity for the purposes of O.70. See the judgment of the Master of Rolls in *Craig* v. *Kanssen* [1943] 1 K.B. at 260; 1963 *Annual Practice* at p. 1986. The reference to the plaintiff as "Anthony Niblock Liquidator Venhen Assurance Co. Ltd. (In Liquidation)" in the title of the Originating Summons is not due to non-compliance with a rule. For instance in proceedings by and against partners in a partnership O.48A must be complied with and non-compliance may be cured by invoking O.70. But the requirement that a liquidator cannot bring proceedings in his name is provided by ss. 185 and 186 of the Companies Ord. See *Re Winterbottom, Ex. p. Winterbottom* (1886), 18 Q.B.D. 446 at 448, 450; *Ex. p. Debtor* v. *Hunter* [1952] Ch. 192 at 195. Nor is this defect curable by amendment under O.16 r.2 because as the liquidator cannot sue, the proceedings were therefore not properly constituted, so that in effect there was no applicant. Proceedings therefore *void ab initio* *Finnegan* v. *Cementation Co. Ltd.* [1953] 1 Q.B. 688, 700, *Hilton* v. *Sutton Steam Laundry* [1946] K.B. at p. 70; *Burns* v. *Campbell* [1952] 1 K.B. 15 at 17, 18, see remarks of Devlin L.J. in *Pontin* v. *Wood* at p. 268. (*Re Sartoris's Estate, Sartoris* v. *Sartoris* [1892] 1 Ch. D. at p. 14; *In Re Sacker*, 22 Q.B.D. at p. 185, 186; *Debtor* v. *Hunter* [1952] Ch. at p. 195). At any rate liquidator was one of 5 and cannot sue alone. *Palmer: Precedents* 17th Ed. Part 2 p. 185. As regards the form of the O. S., O.54 r.4F(1) permits the form used by the respondent if s. 26 of the Advocates and Solicitors Ordinance applies otherwise the prescribed form must be used as provided for under O.54 r.4B (App. K. Form 1B).

Y. S. Chong: Refers to *Whittam* v. *W. J. Daniel & Co. Ltd.* [1961] 3 W.L.R. 1123. A case of misnomer which is curable.

Lim Kean Chye in reply.

Cur. Adv. Vult.

Thomson C.J.: I propose to deal with this appeal as I think it deserves to be dealt with, that is very briefly.

The appellants are solicitors and some time in 1961 they did some work which was paid for on a lump sum basis for a limited liability company known as the Venhen Assurance Company Limited. On 13th March, 1962, a winding-up order was made by the Court in respect of that company under the provisions of the Life Assurance Companies (Compulsory Liquidation) Act, 1962, and liquidators were appointed.

In the course of their activities the liquidators had occasion to examine the transaction between the appellants and the company and decided that they wished to have further information regarding it. To that end one of the liquidators commenced proceedings against the appellants asking for delivery of a detailed bill of costs and taxation of the same. As to the merits of that claim it would be wrong to express any opinion here and I am quite content to deal with the present appeal on the ground that the claim is not well founded.

These proceedings were commenced by way of Originating Summons issued in the name of the liquidator who was thus described:—

"Anthony Niblock

Liquidator,

Venhen Assurance Co. Ltd.,

(In Liquidation)."

The appellants then took proceedings to have the Originating Summons struck out on a number of grounds. The only one of these which is even capable of bearing examination was that proceedings should have been commenced not in the name of the liquidator but in the name of the company and that this was so serious a defect as to render the proceedings a nullity and so demand that they should be treated as such and set aside.

The trial Judge agreed that the proceedings should have been brought in the name of the company but was of the opinion that this amounted to a mere irregularity which was not fatal but was capable of being cured and he proceeded to cure it by amending the title of the Originating Summons which he accordingly refused to set aside.

Against that decision the appellants have now appealed.

Regarding the appeal my view is that both the Judge and the appellants are wrong, but that the appellants are much more wrong than the Judge.

The commencement of the proceedings by the Liquidator in his own name was not a nullity. It was not an irregularity, not even a baby one. It was right. The coy nymph "commonsense" lives in the deeper recesses of the forensic jungle in which we live and convention requires that I should add to her still small voice the louder sounding notes of authority in support of what I say.

I do so.

Authority is to be found in the cases of *In re James;*[1] *In re Marseilles Extension Railway and Land Company;*[2] *In re Foss*[3] and *In re Palace Restaurants, Ltd.*[4]

All these cases are in *pari materia* with the present one in that all of them are concerned

with applications by liquidators connected with solicitors' bills of costs. In the last of them the judgment of the Court of Appeal was delivered by Lord Wrenbury, and surely there can be no greater authority on Company Law. He said (at p. 499):—

"The question is whether, upon the application of the official receiver as liquidator in a compulsory winding-up, the Court sitting in winding-up can order taxation of the solicitors' bill of costs against the company for a period before the commencement of the winding-up."

His Lordship answered that question in the affirmative.

In my view the appeal should be dismissed with costs and the respondent should have his costs in the Court below of which he was deprived, presumably on the ground that he had been guilty of an irregularity and would have had to come to the Court for amendment in any event.

To avoid any further costs being incurred I think the order made by Ong J. dated 3rd January, 1963, should be amended by the deletion of all portions relating to the description of the applicant.

Hill J.A.: I have had the advantage of reading the judgment of the learned Chief Justice, with which I agree and have nothing to add.

Barakbah J.A.: I have had the advantage of reading the judgment of the learned Chief Justice, with which I agree and have nothing to add.

Appeal dismissed.

Solicitors:—*Lim Cheng Ean & Co.; Shearn, Delamore & Co.*

SIMIRAH v. CHUA HOCK LEE & ANOR.

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) May 20, 1963]

[K.L. — F.M. Civil Appeal No. 7 of 1963]

Negligence—Driver of motor-car blinded by undipped lights of on-coming car—Motor-car kept in motion whilst driver so blinded—Duty of driver—Prima facie evidence of negligence.

Submission of no case—Duty of Judge to put Counsel to election whether to call evidence before ruling on it.

Evidence—Whether admission of driver binding on the owner.

Whilst driving a motor-car belonging to the first defendant, the second defendant knocked down a cyclist and fatally injured him at 5.45 a.m. There were no eye-witnesses to the accident. In a subsequent statement to the police the second defendant admitted knocking against a cyclist but gave as his excuse that he was temporarily blinded by undipped lights of an oncoming car. The learned trial judge held that the second defendant had no case to answer.

Held: (1) there was *prima facie* negligence on the part of the second defendant in that he failed to bring his vehicle to a halt when he was temporarily blinded;

(2) in cases of negligence if a court is asked to rule at the end of the plaintiff's case that the plaintiff has made out no case, it is most desirable that the court should put counsel for the defence to his election as to whether he wishes to call evidence for the defence and should refuse to give a ruling unless counsel elects to call no evidence;

(3) the admission of the second defendant was not admissible against the first defendant and the appeal against him would be dismissed.

Retrial ordered of second defendant.

Cases referred to:—

(1) *Laurie* v. *Raglan Building Co. Ltd.* [1942] 1 K.B. 152, 154.

(2) *Morris* v. *Luton Corporation* [1946] K.B. 114.

(3) *Parry* v. *Aluminium Corporation, Ltd.* 162 L.T.R. 236.

(4) *Yuill* v. *Yuill* [1945] P. 15.

(5) *Storey* v. *Storey* [1960] 3 All E.R. 279.

(6) *Burr* v. *Ware Rural District Council* [1939] 2 All E.R. 688.

COURT OF APPEAL.

T. S. Chiam for the appellant.

H. E. Cashin for the respondents.

Cur. Adv. Vult.

Thomson C.J.: This appellant is the widow and the administratrix of the Estate of one Johan bin Alias, deceased.

On 4th February, 1960, while cycling along the main road from Ayer Hitam to Kluang Johan bin Alias was knocked down by a motor-car driven by the second defendant and alleged to be the property of the first defendant and sustained personal injuries as a result of which, it is said, he died. In these circumstances the appellant sued for damages for the benefit of the estate of the deceased under section 8(1) of the Civil Law Ordinance and for loss of support for herself and the children of the deceased under section 7 of the Ordinance.

At the trial the evidence against the second defendant was that of two police officers and of a man Paiman bin Mohamed Sadir.

Inspector Ong Chong Watt said that on 4th February, 1960, he received information of an accident at 5¼ milestone Kluang/Ayer Hitam Road and proceeded to the scene where he drew a sketch plan of what he found.